IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

NO. 235.

ANDREW J. DAVIS

vs.

HIRAM R. MILLS ET AL.

On certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF ANDREW J. DAVIS IN OPPOSITION TO MOTION TO REQUIRE CIRCUIT COURT OF APPEALS TO CERTIFY TO THIS COURT THE ENTIRE RECORD.

Statement.

This is an action brought against the defendants to enforce a liability arising under a statute of the State of Montana making directors or trustees of corporations organized under the laws of said State liable for the debts of the company. The statute in question is quoted in Brief of Counsel for Hiram R. Mills, page four, and is a part of the general law of said State providing for the incorporation of companies for manufacturing, mining and other purposes and is the law under which the Obelisk Mining & Concentrating Company (of which company the defendants were trustees) was incorporated, as appears from the Complaint of the plaintiff. This law also contains the further provision:

"Sec. 463: If any certificate or report made or public notice given by the officers of any such company, in pursuance of the provisions of this chapter, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof."

The defendants demurred to the Complaint of plaintiff upon the ground,

"Because it appears from said Complaint that the several causes of action therein alleged each and all accrued more than three years prior to the commencement of this action, and did not accrue within three years prior to the commencement of this action."

Transcript filed in C. C. A., p. 32.

The demurrer was sustained by the trial Court and a judgment entered for defendants. Whereupon the plaintiff sued out a writ of error and the cause was removed to the Circuit Court of Appeals for review.

Argument.

I.

Counsel for defendant has referred to various questions, arising in the cause prior to the determination of the demurrer mentioned. He does not contend that any one of these questions was either presented to or considered by the Circuit Court of Appeals or that they were before that Court for consideration, or that they could be considered by this Court if the entire record were sent up. We will therefore pass them, only saying that none of them in any way affects the consideration of the question certified, that they are all well settled by uniform adjudications, and that no one of them is of sufficient importance, in view of past determinations of the law, to demand the judgment of this Court. To support our contention we refer to the learned opinions of the trial Judges delivered upon the determination of the several questions.

Davis vs. Mills, 83 Fed., 982.

Davis vs. Mills, 99 Fed., 39.

II.

It was argued by Counsel for defendants in error in the Circuit Court of Appeals that the cause of action set forth is barred by the provisions of

Sec. 1120 Gen. Stats. Conn., Rev. 1902.

This section reads as follows:

"No suit for any forfeiture upon any penal statute shall be brought but within one year next after the commission of the offense."

And if not barred by the section quoted, that said cause of action is barred by

Sec. 515 Code Civ. Proced., Mont.

That section reads:

"Sec. 515: Within two years: I. An action upon a statute for a penalty or forfeiture, when the action is given to an individual or to an individual and the State, except when the statute imposing it prescribes a different limitation."

And that if said cause of action is not barred by either of the above sections that then it is barred by

Sec. 554 Code Civ. Proced., Mont.

That section reads:

"Sec. 554: This title does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability created."

The circuit Court of Appeals decided that the action is not barred either by Sec. 1120 Gen. State. Conn. quoted, nor by Sec. 515 Code Civ. Proced., Mont., quoted, and certified to this Court the question as to whether the action is barred by Sec. 554 Code Civ. Proced., Mont., quoted.

Our contention is:

1. *That it has been settled by the uniform decisions of Courts of highest authority that the action is not barred by Sec. 1120 Gen. Stats. Conn.*

2. *That it is likewise settled by uniform adjudications that the plaintiff's right to maintain this action in the State of Connecticut is in nowise affected by Sec. 515 Code Civ. Proced., Mont.*

3. *That the determination of the question certified does not necessarily involve the consideration of either of the above questions.*

4. *That neither question one nor two above mentioned is of sufficient importance in view of past adjudications to demand the judgment of this Court.*

5. *The motion to require the whole record to be certified up should be overruled.*

I.

Both Sec. 460 and Sec. 463 of the Compiled Statutes of Montana of 1887 were adopted from the State of New York. Said Sec. 463 appears as Sec. 21 in Statute of New York of 1875, C. 611. That statute received interpretation by this Court in the case of

Huntington vs. Attrill, 146 U. S., 657.

That was a suit in equity brought in the Circuit Court of Baltimore by the plaintiff to subject certain property to the satisfaction of a judgment recovered in a Court of the State of New York. The bill alleged not only said judgment, but the original liability upon which it was founded. The judgment in question had been recovered against the defendant on account of a liability arising under the provisions of Sec. 21 Statute of New York of 1875, C. 611, referred to above. The original cause of ation, therefore, upon which that judgment was recovered was identical with that which is the foundation of the present action, with the exception that the liability in that case arose under the provision making the directors of the corporation liable for the debts of the company, in case the report filed was false in any material respect, while in the present action the liability arises under the provision which makes the directors so liable in the event of a failure to file a report. It is plain that the two actions can not be distinguished upon that ground.

In that case the defendant made the objection that the suit could not be maintained in Maryland, inasmuch as the liability, which was the foundation of the judgment recovered in New York, was in the nature of a penalty arising under a statute of the State of New York, and which penalty could not be enforced beyond the territorial limits of the State of New York. This objection was overruled in the trial Court, but its decision was reversed by the Appellate Court and the suit was brought into this Court on writ of error to review such decision. This Court there determined that the nature of the original liability was not changed by recovering judgment upon it. The language of the Court upon this question was:

"The essential nature and real foundation of a cause of action, indeed, are not changed by recovering judgment upon it."

The Court then proceeded to consider the character of the original cause of action and holding that it was not for the recovery of a penalty in the strict and international sense, reversed the judgment of the Court of Appeals of the State of Maryland.

The Court in that case in determining the question of whether the liability was penal in its nature considered the different classi-

fications of penalties and uses the following language:

"Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State, and which, by the English and American statutes, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal."

And the Court further says:

"The test whether a law is penal in the strict and primary sense is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs*.'"

In the course of the discussion the Court referred to the case of

Wisconsin vs. Pelican Life Ins. Co., 127 U. S., 265,

where the liability sought to be enforced was held to be penal in the strict and international sense. It was pointed out, and the decision of the Court in that case was approved because of the fact, that the action was brought in the name of the State and the proceeds of the action when recovered went to the benefit of the State, and the action was for a recovery for an infraction of a law intended for the protection of the general public, and not an enforcement of a civil right given to a private individual.

It must be conceded, therefore, that it has been distinctly determined by a decision of this Court, in which as to this proposition there was no dissent, that the liability which is the foundation of the present action is to be classified as arising out of a private wrong and not a public wrong, according to Blackstone's classification.

It has likewise been repeatedly decided by the Court of last resort of the State of Connecticut that actions which come within the provisions of Sec. 1120 Gen. Stats. Conn., quoted above, are actions for public wrongs, and that whenever it has been determined in a particular case that the action is for a recovery for a private wrong, then it has been held that that section has no application.

The Supreme Court of Errors of Connecticut in the case of

Plumb vs. Griffin, 50 At. Rep., 1,

said with reference to the Connecticut statute of limitation referred to, that it is only applicable to a penal statute,

"one that declares a forfeiture, and one that deals with an offense. And it must be a forfeiture and an offense in the sense in which these terms are used in a penal statute. Penal statutes,

strictly and properly, are those imposing punishment for an offense against the State. And the expression 'penal statutes' does not ordinarily include statutes which give a private action against a wrongdoer. The words 'penal' and 'penalty' in their strict and primary sense denote a punishment, whether corporal or pecuniary, imposed and enforced by the State for a crime or offense against its laws."

The following are other cases construing this statute of limitation:

Wells vs. Cooper, 17 At., 281.
Borough vs. Hall, 64 Conn., 426.
Drake vs. Watson, 4 Day, 37.
Ross vs. Bruce, 1 Day, 100.

An examination of these cases will disclose that in every case where the statute in question was held applicable the action was brought to recover for an infraction of a law made for the benefit of the general public, and that it has never been held applicable in any case where the recovery went wholly to the benefit of an individual. It must therefore be conceded that the question has been determined by judicial authority of the highest character.

In Mitchell vs. Hotchkiss, 48 Conn., 18,

the sole question for determination was whether the cause of action survived. The liability was spoken of in the opinion as a penalty, but the question was not necessary to a determination of the case, however, and the remark of the Court is clearly *obiter*. Besides, there is nothing in the case which in any way indicates the view of the Court as to whether the section of the statute of limitations referred to would be applicable.

2.

Upon plain principles universally acknowledged Sec. 515 of the Code of Civil Procedure of Montana is utterly inapplicable to an action brought in a Court sitting in the State of Connecticut, for it is a universal rule, to which there are no exceptions, that the Courts of one State or Sovereignty do not enforce the statute of limitations of other States or Sovereignties, because statutes of limitations, properly speaking, relate to the remedy solely, and as to the remedy the law of the forum must govern.

Townsend vs. Jemison, 9 How. U. S., 407.
Michigan Ins. Bank vs. Eldred, 130 U. S., 693.

It was contended by the learned Counsel for the defendant in

error in the Circuit Court of Appeals that Sec. 515 Code Civil Procedure of Montana was not, properly speaking, a statute of limitation, but that it inhered in and governed the right sought to be enforced. His contention was that the case came within the rule stated by Judge (now Associate Justice) Brown in the case of

Boyd vs. Clark, 8 Fed., 849, as follows:

"Where a statute gives a right of action unknown to the common law, and either in a proviso to the section conferring the right or in a separate section limits the time within which an action shall be brought, such limitation is operative in any other jurisdiction wherein the plaintiff may sue."

A casual examination of the statutes of Montana will show that Sec. 515 Code of Civil Procedure of Montana is not a part of the statute which gives the right of action, and that it was never at any time in the history of the legislation of that State a part of such statute, but that it is a part and always has been a part of the general statutes of limitations of the State, and relates to the remedy solely.

The statute imposing the liability is Sec. 460 of the General Laws of the State of Montana, comprising the fifth division of the Compiled Statutes of 1887 and found on page 728 of the same. The limitation statute in force at the time the liability arose, which is the subject of this suit, is Sec. 45 of the Code of Civil Procedure, is a part of a chapter entitled "Of the Time of Commencing Actions," and is also found in the Compiled Statutes of 1887, which is a compilation merely of laws theretofore enacted and then in force. The Code of Civil Procedure, embracing Sec. 45 (limitation statute) was enacted February 16, 1877. See Laws of Montana, Tenth Session, 1877, pages 42 to 215 inclusive. The liability section was a part of the first general act passed by the Legislature of the Territory of Montana for the organization of corporations, approved June 12, 1872, as will be seen by a notation on page 462 of the Revised Statutes of 1879. It will thus be seen that the limitation statute and the liability statute never formed parts of the same act at any time prior to the time when the liability which is the subject of the present suit arose. After plaintiff's right of action had accrued and matured, the Codes of Montana of 1895 were adopted and the two statutes were re-enacted and continued in force as a continuation of the old law. By this codification of the laws the two statutes, however, still continue as parts of separate and distinct acts. Sec. 45 Code of Civil Procedure, Compiled Statutes of 1887, appears as Sec. 515 of the new code, the period of limitation

being changed, however, from one year to two years. Sec. 460 of the General Laws, Compiled Statutes of 1887, appears Procedure wherein is found the limitation statute was approved February 14, 1895 (see memorandum at close of same). The Civil Code wherein appears the liability statute was approved February 19, 1895 (see memorandum at close of Civil Code).

In no proper sense, therefore, can Sec. 515 of the Code of Civil Procedure be considered as a part of the section which declares the liability of trustees or directors of corporations for failure to file an annual report. The limitation statute, therefore, is strictly a *general* statute of limitation, and according to the decision of this Court in

Union Pacific Ry. Co. vs. Wyler, 158 U. S., 285,

could have no application to an action brought in the State of Connecticut.

3, 4 *and* 5.

The foregoing abbreviated discussion of propositions one and two is sufficient, we think, to make it plain to the Court that a consideration of the question certified does not necessarily involve their consideration.

It must also be plain, we think, that with respect to proposition one, that the liability which is the subject of this suit has been decided by this Court to be based upon a *private wrong*, and that it has been decided by the Court of last resort of the State of Connecticut, which decision is a law affording a rule of decision for the federal courts that the section of the statute of limitations of Connecticut relied upon by the defendants as barring the action, does not apply to actions for private wrongs; and with respect to proposition Two it is likewise plain that it is well settled by decisions of this Court that Sec. 515 of Montana Code of Civil Procedure, being a general statute of limitation of Montana cannot have the effect of barring this action brought in Connecticut.

The propositions being thus settled, the defendant is clearly not in a position to demand their reconsideration by this Court. Particularly so in view of the fact that the plaintiff has already borne the burden of this action for six years past, and the motion is not made until after the plaintiff has, at his expense, had the record printed as certified.

We most respectfully submit that the motion should be denied.

JOHN A. SHELTON,
Of Counsel for Andrew J. Davis.

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JAMES H. MCKENNEY,

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On certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF ANDREW J. DAVIS ON QUESTION CERTIFIED.

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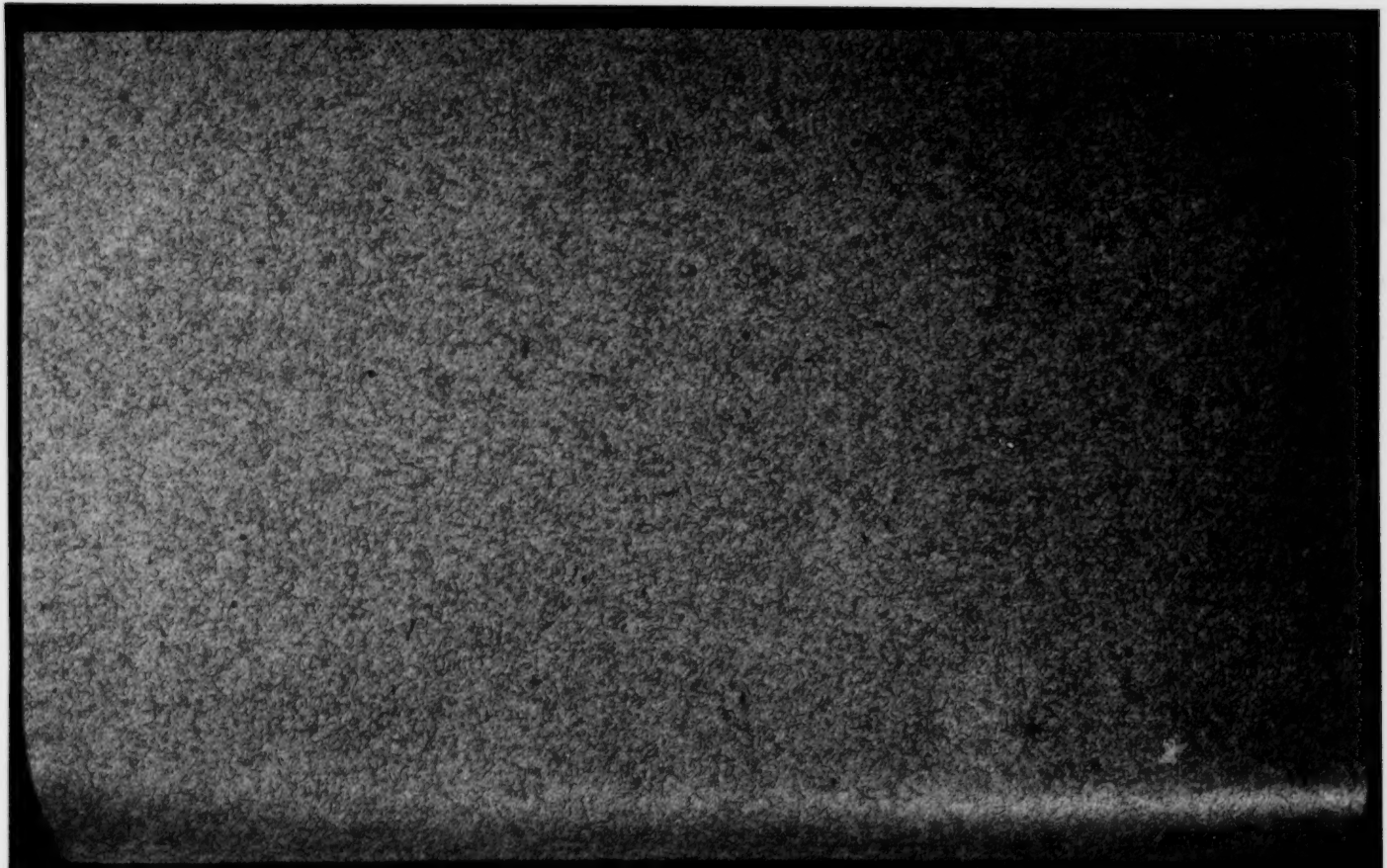

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 285

ANDREW J. DAVIS

vs.

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On certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF ANDREW J. DAVIS ON QUESTION CERTIFIED.

STATEMENT.

This case is before this Court on a question certified by the United States Circuit Court of Appeals for the Second Circuit.

The proposition of law or question which the Court is called upon to answer is stated in the certificate (omitting the statutes quoted) as follows:

"Statement of Facts.

"The plaintiff is a citizen of Montana and the owner "by assignment of three causes of action (for goods sold "and on a promissory note) against the Obelisk Mining and "Concentrating Company, a Montana corporation. The in- "debtedness of the company upon these causes of action "accrued July 31, 1892, July 1, 1892 and December 12, "1892, respectively. The defendants are and always have "been citizens and residents of Connecticut, and at all "times mentioned in the complaint were trustees of the said "Obelisk Mining Company and none of them has been in "Montana since 1890. The statute of Montana provides "that within twenty days from the first day of September "every such company shall annually file a specified report, "and that if it 'shall fail to do so, all the trustees of the "compay shall be jointly and severally liable for all the "debts of the company then existing, and for all that shall "be contracted before such report shall be made.' Section "460 of chapter 25 of the fifth division, Compiled Statutes "of Montana which was in force when the cause of action "arose. Re-enacted as section 451 of the Civil Code of "Montana, which went into effect July 1, 1895."

"The Obelisk Mining Company failed to file certain of "the required reports and the cause of action sued upon "here, against the defendants as trustees to recover the "debts of the company, accrued September 22, 1893, or "prior thereto. This action was brought to enforce the "joint and several liability of the defendants under the stat- "ute on July 30, 1897. * * * * * * * * *"

"Question Certified."

"Upon the facts above set forth the question of law con- "cerning which this court desires the instruction of the "Supreme Court, for its proper decision, is:"

"May a defendant in an action of the kind specified "in section 554 of the Code of Civil Procedure of Montana, "avail of the limitation therein prescribed, when the ac- "tion is brought against him in the court of another State?"

Cert., pp. 1, 2, 3 and 4.

Omitting the statutes quoted the question may be more briefly stated as follows:

Will section 554 of the Code of Civil Procedure of Montana (1895) operate to bar an action begun on the 30th day of July, 1897, in the United States Circuit Court for the District of Connecticut, against a defendant who has never been in Montana since 1890, upon a liability arising against him as a trustee of a Montana corporation for failure to make or file, within twenty days from the 1st day of September, 1893, the report required by Section 460, Chapter 25, Fifth Division, Compiled Statutes of Montana of 1887?

ARGUMENT.

This being an action at law brought in the United States Circuit Court for the District of Connecticut,

(Cert. p. 1, ll., 9-10.)

the time within which the action can be brought is determined by the *lex fori*; in this case the statues of Connectctut.

In Townsend vs. Jemison, 9 How. (U. S.), 407,

it was said that the above rule had then "become a formulary in international jurisprudence."

This Court there also said:

> "The rule in the Courts of the United States in respect "to pleas of the statutes of limitations has always been "that they strictly affect the remedy and not the merits."

The correctness of this rule has been many times reaffirmed.

Michigan Ins. Bank vs. Eldred, 130 U. S., 693.
Telegraph Co. vs. Purdy, 162 U. S. 329.

It has also been quite uniformly followed.

Whitman vs. Citizens Bank, 110 Fed., 503-512.
Dexter vs. Edmands, 89 Fed. 467.
Schiffer vs. Trustees of Columbia College, 87 Fed. 166.

If section 554 of the Code of Civil Procedure of Montana is a statute of limitation it would seem therefore that the question propounded must be answered in the negative, since according to the rule, the limitation statutes of Connecticut alone can be appealed to as barring the action.

We are met with the contention however, that the section of the statutes of Montana referred to is not, properly speaking, a

statute of limitation, but that the case is one where the right itself, which is the basis of the action, is granted only upon condition that suit be brought to enforce it within the time specified, and after the lapse of the specified time without suit being brought, the right itself is extinguished, and no suit for its enforcement can be maintained in any jurisdiction whatever.

We submit in answer that the bare reading of the Montana statutes applicable is sufficient to show that the argument is without any sound foundation. The true rule was most clearly stated by Judge (now Associate Justice) Brown in the case of

Boyd vs. Clark, 8 Fed., 849,

as follows:

> "Where a statute gives a right of action unknown to "the common law, and, either in a proviso to the section "conferring the right or in a separate section, limits the "time within which an action shall be brought, such limi- "tation is operative in any other jurisdiction wherein the "plaintiff may sue."

The rule was applied in that case, which was an action brought to recover damages for the death of a person occurring in the Province of Ontanio, by the law of which Province an action was awarded, but it was provided that every such action should be commenced within twelve months after the death of the deceased person.

The rule has been frequently applied in actions brought upon statutes giving a right of action for wrongful death, and the reported cases arising under these statutes very clearly indicate its scope and applicability.

Most of these statutes are founded on what is commonly known as Lord Campbell's act, an act of the English Parliament giving a right of action which did not exist at the common law, for damages for the death of a person when caused by the wrongful act or neglect of another. It provided that an action to enforce the right must be commenced within two years.

In the case of

Hamilton vs. Hannibal & St. J. R. Co., 18 Pac, 57,

the action was brought in the State of Kansas to recover damages on account of the death of a person occurring in the State

of Missouri. The action was brought by the widow of the deceased. Under the statute of the State of Missouri granting the right of action, it was provided that the action might be maintained by the wife if instituted within six months. The Court said:

"The statute upon which she based her action provides, "as we have seen, that the widow may sue and recover "damages; but, if she fails to bring her action whithin six "months, the right thereafter vests in her minor children. "The right of action under the statute, therefore, only re- "mained absolutely in the wife for the period of six months; "after that time it vested absolutely in the children.. The "provision designating when and by whom a suit may be "brought is more than a mere limitation; it is a condition "imposed by the legislature, which qualifies the right of re- "covery, and upon which its exercise depends. The Su- "preme Court of Missouri has recently examined and inter- "preted this statute, and in an elaborate opinion reaches "the conclusion that the right is a conditional one; and the "condition, being annexed to the right as given in the stat- "ute, modifies the same, and, in fact, forms a part of the "right itself. Barker vs. Railroad Co., 91 Mo., 86."

Upon the other hand, the statute of the State of Kansas granting a right of action in cases of wrongful death did not declare the time within which the action might be commenced to enforce the right, but left the determination of that question to be solved by the general statutes of limitations of that state.

An action was brought in the State of Missouri to enforce the right arising under the statute of the State of Kansas on account of a death occurring in that state, and this Court held that the Kansas statute had no application, and that the only statute applicable was the statute of the State of Missouri.

Union Pacific vs. Wyler, 158 U. S., 285.

In the case of

Laidlow vs. O. R. & N. Co., 81 Fed. 876,

the Court had under consideration statutes of the State of Oregon, as follows:

"When the death of a person is caused by wrongful "act or omission of another, the personal representatives "of the former may maintain an action at law therefor

"against the latter, if the former might have maintained "an action, had he lived, against the latter, for an injury "done by the same act or omission. Such action shall be "commenced within two years after the death." Hill's Ann. Code, 371.

"Every boat or vessel, used in navigating the waters "of this state * * * shall be liable and subject to a "lien * * * for all * * *damages or injuries done "to persons or property by such boat or vessel." Id., Sec. 3690.

The Court said with reference to these statutes:

"The local law giving the lien, however, conditions "the right upon the commencement of the action within "two years after the death. Time has thus been made 'of "the essence of the right,' and the right is lost if the time is "disregarded. The Harrisburg, 119 U. S., 199; 7 Sup. "Ct., 140."

The case in the 119th United States, above referred to, was of a similar character.

It was an action in admiralty brought in the Eastern District of Pennsylvania to recover damages suffered on account of the death of one occasioned by a collision occurring within the jurisdiction of the State of Massachusetts. A statute of the State of Pennsylvania provided as follows:

"That whenever death shall be occasioned by unlaw- "ful violence or negligence, and no suit for damages be "brought by the party injured, during his or her life, "the husband, widow, children or parents of the deceased, "and no other relative may maintain an action for and "recover damages for the death thus occasioned. The "action shall be brought within one year after the death "and not thereafter." Brightly, Purd. Dig. 11th Ed., 1268, Secs. 3, 4, 5; Act of April 15, 1851, Sec. 18; Act of April 6, 1855, Secs. 1, 2.

And a statute of the State of Massachusetts provided as follows:

"If, by reason of the negligence or carelessness of a "corporation, or of the unfitness or gross negligence of "its servants or agents while engaged in its business, "the life of any person, being in the exercise of due dili- "gence * * * is lost, the corporation shall be pun- "ished by a fine of not exceeding five thousand nor less

"than five hundred dollars, to be recovered by indictment "and paid to the executor or administrator for the use of "the widow and children. * * * Indictments against "corporations for loss of life shall be presented within "one year from the injury causing the death." Gen. Stat. Mass. 1860, Chap. 63, Secs. 97-99; Stat. 1874, Chap. 372, Sec. 163.

These statutes are quoted in the opinion of Chief Justice Waite. It was contended that the right of action could be maintained in admiralty independent of the statute, but the Court denied this contention and held that the action must be maintained, if maintained at all, on the statutes above referred to, and commenting upon the same, the opinion says:

"This brings us to the second branch of the question, "which is, whether, with the Statutes of Massachusetts "and Pennsylvania above referred to in force at the time "of the collision, a suit in *rem* could be maintained "against the offending vessel if brought in time. About "this we express no opinion, as we are entirely satisfied "that this suit was begun too late. The statutes create "a new legal liability, with the right to a suit for its en- "forcement, provided the suit is brought within twelve "months, and not otherwise. The time within which the "suit must be brought operates as a limitation of the "liability itself thus created, and not of the remedy alone. "It is a condition attached to the right to sue at all. No "one will pretend that the suit in Pennsylvania or the in- "dictment in Massachusetts, could be maintained if "brought or found after the expiration of the year; and "it would seem to be clear that, if the admiralty adopts "the statute as a rule of right to be administered within "its own jurisdiction, it must take the right subject to the "limitations which have been made a part of its existence. "It matters not that no rights of innocent parties have "attached during the delay. Time has been made of the "essence of the right, and the right is lost if the time is "disregarded. The liability and the remedy are created "by the same statutes, and the limitations of the remedy "are therefore, to be treated as limitations of the right." In

Munos vs. Southern Pac. Co., 51 Fed., 188,

an action was brought in the Circuit Court for the Western

District of Texas to recover on account of a death occurring in the Territory of New Mexico. The New Mexico act contained a section providing a limitation of time within which the action to enforce the right given by the statute should be commenced. This was subsequently repealed and then the repealing act was repealed, and the question arose whether thereby the original limitation section was revived. The Court said:

"If the said section 2316 (the limitation section) of "the Compiled Laws of New Mexico was not revived by "the repeal of the repealing act, then there was no period "of limitation prescribed as a part of the remedy given "by section 2308 of the Compiled Laws of New Mexico, "under which the present action was brought, otherwise "than as provided by the general law of limitations in "said territory, in which case the laws of Texas in regard "to the limitation of actions would apply."

The true rule is declared in this case, namely, that if appeal must be made in the state of the forum to general statutes of limitation of the state in which the cause of action arose, the appeal is ineffectual, for such general statutes of limitations do not apply. If the very statute giving the right prescribes a time within which the action must be brought, then the action must be brought within that time, wherever it is commenced.

The opinion in the case last above cited conlcudes with the following clear statement of the rule:

"Where torts are committed in foreign countries, or "beyond the territorial jurisdiction, the *lex fori* governs, "no matter whether the right of action depends upon the "common law or a local statute, unless the statute which "creates or confers the right limits the duration of such "right to a prescribed time."

In Boyd vs. Clark, above referred to, Judge Brown said in the opinion:

"If this statute (the statute of Ontario giving the "right to maintain the action for the death) contained "no limitation of time, within which the action must be "brought, and the time had been left to depend upon the "general statutes of limitation in the Province of On-

"tario, it is clear that we should have disregarded such "statute and permitted the plaintiff to bring this action "at any time before actions of this description would be "barred by the statutes of this state."

In

Pittsburg vs. Hine, 25 Ohio St., 629,

the act gave compensation for death by wrongful act, neglect or default, and the section giving the right concluded, "provided such action shall be commenced within two years." It was held that the provision was a condition of the right which attached to it in any state in which it was sought to be enforced.

A statute considered by the Supreme Court of North Carolina giving damages for wrongful death, provided that the person causing the death "shall be liable to an action for damages to be brought in one year after such death." With reference to this, the Court said:

"This is not strictly a statute of limitations. It gives "a right of action that would not otherwise exist, and the "action to enforce it must be brought within one year "after the death of the testator or intestate, else the right "of action will be lost."

Taylor vs. Cranberry, 94, N. C., 525.

In

Lambert vs. Ensign, 26 S. E., 431,

the Court had under consideration a statute giving a cause of action for wrongful death, the section giving the right, concluding, "Provided that every such action shall be commenced within two years after the death of such deceased person." This was also held to be a condition.

In opposition to the cases last above referred to may be put the case of

O'Shields vs. Georgia Pac. R. Co., 85 Ga., 621.

This was an action brought in the State of Georgia for a death caused by the negligence of the defendant in the State of Alabama. The Court said:

"We have examined the Alabama statute, both as "set out in the Code and as it appears in the Acts of 1885, "p. 115, and in neither is there any limitation as to the

"time within which the action based upon the statutory "right is to be brought. The limitation prescribed is "found alone in the General Limitation Law of Alabama, "which fixes the limitation at one year for * * * * * "actions for any injury to the person or rights of another "not arising from contract and not herein specifically "enumerated."

The Georgia statute applicable to the case was two years, and it was held that the Alabama statute did not apply and that the Georgia statute did, and that the action was not barred.

Reference was made in the opinion to an earlier case decided by the same Court,

Selma R. & R. Co. vs. Lacy, 49 Ga., 107,

which arose upon an Alabama statute also, but a different one from that under consideration by the Court, which read as follows:

"When the death of a person is caused by the wrong-"ful act or omission of another, the personal representa-"tives of the former may maintain an action against the "latter at any time within one year thereafter, if the "former could have maintained an action against the lat-"ter for the same act or omission had it failed to produce "death."

It was held under this statute in that case that the action could be maintained in Georgia after the expiration of a year, and contrasting the effect of the two statutes, the Court said:

"According to all the authorities, an action under "such a statute as this could not be maintained any-"where after the bar had attached in the local jurisdic-"tion, for the reason that after that time the right would "be extinct as well as the remedy; but the Act of 1885, "upon which the present suit is founded, contains no such "terms and there is no more reason for holding that the "General Limitation Law of Alabama, which we have "cited above, extinguishes the statutory rights of action "to which it applies, than for holding that it extinguishes "the common law rights of action to which it is appli-"cable."

The statute of Montana prior to the adoption of the Codes of 1895, giving a right of action for wrongful death, consisted

of two sections. Section 981 provided that the person causing the death should be liable, and section 982 first provided by whom the action should be brought and for whose benefit, and fixed a limit of recovery, and then concluded, "Provided that every such action shall be commenced within three years after the death of such person."

An action was brought under this statute in the Circuit Court of the United States for the Distict of Minnesota. The Minnesota statute read as follows:

> "When death is caused by the wrongful act or omis-
> "sion of any party the personal representatives of the de-
> "ceased may maintain an action, if he might have main-
> "tained an action had he lived, for an injury caused by
> "the same act or omission, but the action shall be com-
> "menced within two years after the act or omission by
> "which the death was caused. The damages thereon can-
> "not exceed $5,000, and the amount recovered is to be for
> "the exclusive benefit of the widow, and next of kin, to
> "be distributed to them in the same proportion as the
> "personal property of the deceased person." Gen. St. 1877, C. 77, Sec. 2.

It was held that the limitation in each of these statutes was in the nature of a condition or incident of the right, and that the Minnesota statute had reference only to causes of action arising in the State of Minnesota, and that the action could be maintained within the period limited by the Montana statute, although the period limited for the commencement of similar actions under the Minnesota statutes for deaths caused in the State of Minnesota had expired.

Theroux vs. Northern Pacific, 64 Fed., 821.

In an action brought in the United States Circuit Court for the Southern District of New York, it was held that an action for death occurring in New Jersey could not be maintained after the period limited by the New Jersey statute, but in that case the period was prescribed in the very act giving the right, which was in the following terms:

> "And in every such action the jury may give such
> "damages as they shall deem fair and just with reference
> "to the pecuniary injury resulting in such death to the

"wife and next of kin of such deceased person; provided, "that every such action shall be commenced within 12 "calendar months after the death of such deceased per- "son." 1 Gen. St., p. 1188.

Stern vs. LaCompagnie, 110 Fed., 996.

The Circuit Court of Appeals for the First Circuit had under consideration a statute giving an action for wrongful death in the case of

Boston & M. R. R. vs. Hurd, 108 Fed., 116.

Touching the objection that the action was not brought within the time limited by the Massachusetts statute giving the right, the Court said:

"We have observed that the Massachusetts statute, "on which the suit is now rested, gives the right of action "with a qualified provision that it must be brought within "one year from the time of the injury. This is undoubt- "edly based on a matter of local policy, which justly fol- "lows the statute wherever it goes. We must be careful "to notice that a limitation of this kind, incorporated into "a statute giving a cause of action which did not exist at "common law, is substantially unlike a general statute "of limitations. A general statute of limitations must be "pleaded in defense, and it can be replied to in various "ways. A limitation in a statute like this under consid- "eration must be met by pleadings on the part of the "plaintiff and by the plaintiff's proofs."

The character of those statutes in which the time within which an action must be begun is a condition of the right is further illustrated by the statute under consideration in

Walsh vs. Mayer, 111 U. S., 31,

which is as follows:

"The amount of conventional interest shall in no "case exceed eight per cent. under pain of forfeiture of the "entire interest so contracted. If any person hereafter "shall pay on any contract a higher rate of interest than "the above, as discount or otherwise, the same may be "sued for and recovered within twelve months from the "time of such payment."

Actions to enforce liabilities of stockholders in corporations have frequently given rise to the application of the rule appealed to. Sometimes, indeed not infrequently, the statute

creating the liability provides not only the time within which the action must be begun to enforce it, but prescribes the particular remedy. Both of these ordinarily become conditions of the right, and the time feature always does. In other cases, the time within which the action must be begun is not fixed in the statute creating the liability, but is left to be determined by the general statute of limitations. In the former case, under the adjudications, the action must be begun, even in a foreign state, within the time fixed by the statute creating the right. In the latter case, the statutes of limitations of the state giving the right have no application, and the action may be brought within the time fixed by the statutes of limitations of the state where the action is brought.

A case of this character was

Dexter vs. Edmands, 89 Fed., 467.

The Court held that the question of the bar of the statutes of limitations was to be determined by the *lex fori* and in the course of the opinion said:

"The sixth paragraph of the answer is a plea of the "Kansas statute of limitations. It has been repeatedly "decided by the Supreme Court that the time during "which an action can be brought is determined by the *lex "fori;* in this case, the statute of Massachusetts. Town-"send vs. Jemison, 9 How., 407; Telegraph Co. vs. Purdy, "162 U. S., 329, 339, 16 Sup. Ct., 810. It is true that, as "stated by Judge (now Mr. Justice) Brown in Boyd vs. "Clark, 8 Fed., 849, 'where a statute gives a right of ac-'tion unknown to the common law, and either in a proviso "or in a separate section limits the time within which an "action shall be brought, such limitation is operative in "any other jurisdiction wherein the plaintiff may sue.' "See Walsh vs. Mayer, 111 U. S., 31, 37, 4 Sup. Ct. 260. "But the Kansas statute of limitations here relied upon "by the defendant is not a limitation upon the particular "statutory right of action here sued upon, but is a gen-"eral statute limiting actions upon a 'contract not in "writing, express or implied,' and 'upon a liability cre-"ated by statute other than a forfeit or penalty.' Such a "statute does not govern this suit brought in this court."

To the same effect is

Schiffer vs. Trustees of Columbia College, 87 Fed., 166.

In a concurring opinion in

Hobbs vs. National Bank, 101 Fed., 75,

an exactly similar case arising under the same constitution and statutes, Judge Lacombe (without giving his reasons) expressed an opinion contrary to his decision in

Schiffer vs. Trustees of Columbia College, supra.

His concurring opinion in full is as follows:

"I concur fully in the memorandum filed on denying "petitions for rehearing. Nevertheless, I am individually "of the opinion that the statute of limitations applicable "to cases of this sort is the statute of the state whose law "making power has created the liability, or rather that "the action will not be maintained in another state when "a period of time has elapsed which would defeat the ac- "tion of the home state, although possibly that period "may be still further curtailed by the statute of limita- "tions of the state in which the action is brought."

In the case of

Whitman vs. Citizen's Bank, 110 Fed., 503,

however, the United States Circuit Court of Appeals for the Second Circuit (Judges Wallace, Cox and Shipman sitting) said with reference to the plea of the statute of limitations urged against an action upon a liability arising under the same statute:

"Inasmuch as the Kansas statute is a general one, "and the statute in regard to the liability of stockhold- "ers of an insolvent corporation to its creditors do not "contain provisions in regard to the limitations of actions, "we think that the statutes of the forum in which the suit "was brought must apply, and that the Kansas decisions "upon the construction of the statute of limitations are "not controlling in this state."

The case of

Brunswick Terminal Co. vs. Bank, 99 Fed., 635,

decided by the Circuit Court of Appeals for the Fourth Circuit, is in apparent conflict with the decision last above referred to. This was an action brought in the United States Circuit Court for the District of Maryland to enforce a stock-

holders' liability arising under a statute of the State of Georgia. The liability seems to have been created by the charter of the Brunswick State Bank, incorporated by an act of the Georgia Legislature of October 24, 1881. A statute of that state apparently altogether distinct from the act creating the bank, provided as follows:

> "All suits for the enforcement of rights accruing to "individuals under statutes, acts of incorporation or by "operation of law, shall be brought within twenty years "after the right of action accrues."

It was held that the action might be maintained in Maryland within the time prescribed by the Georgia statute, notwithstanding that by the Maryland statute the action would have been barred within three years.

The decision was made to turn upon the fact that the limitation statute, limiting suits for the enforcement of rights "accruing under acts of incorporation" was in existence at the time of and previous to the passage of the act of incorporation of the Brunswick Bank, the Court holding that it must be, therefore, read into such act of incorporation. The Court said with reference to the same:

> "The statute of limitations of the State of Georgia "sought to be applied was not in its broader sense the "general statute of limitation of the state as distinguished "from the statutes contained in the particular enactment; "but it was the special statute of limitations of that state "applicable to statutory liabilities or liabilities arising "under acts of incorporation, or by operation of law, in "*existence at the time and for years previous to the pas-*"*sage of the act of incorporation of the Brunswick Bank,* "*and, therefore, must be considered as forming a part of,* '*as read into, the act incorporating the bank, as much so* "*as if it had been formally incorporated therein, and the* "*stockholders and all persons dealing with this bank are* "*presumed to know of its existence, and are bound by its* "*terms.*"

It is to be noted that Judge Brawley dissented.

Another instructive case arising under the same statute

that was construed in the case of Whitman vs. Citizens' Bank, is

Pulsifer vs. Greene, 52 At., 921.

The action was brought in the State of Maine upon a liability arising under the constitution and laws of the State of Kansas. The statute of the last named state provided that "an action upon a liability created by statute, other than a forfeiture or penalty" must be begun within three years, and it is claimed that this period having elapsed the action could not be maintained in the State of Maine. The Court was guided in its action by the following clear statement of the governing principles from Minor on Conflict of Laws, Section 210:

> "If the state statute that creates the remedy pre-
> "scribes the time within which the action thereon must
> "be brought, it is generally construed as imposing that
> "period for the prosecution of the remedy as a condition
> "for prosecuting it at all. It becomes a part of the right
> "itself, and is governed by the same law that regulates
> "the right in other respects. But if the period of limita-
> "tion is not prescribed by the same statute which confers
> "the right, but is found in a general statute, the general
> "principle applies, and it becomes a law relating to the
> "remedy, which will have no extra territorial force."

The Court then said:

> "In this case paragraph 1192, which creates the lia-
> "bility of the defendant, prescribes no period within
> "which that liability must be enforced. The statute re-
> "lied upon by the defendant is a part of the general stat-
> "ute of limitations of the State of Kansas. It applies to
> "all contracts not in writing, and to all liabilities cre-
> "ated by statute, other than a forfeiture or penalty. Bank
> "vs. Baker, 176 Mass., 294, 57 N. E., 603. It is not there-
> "fore an integral part of the right itself, which goes with
> "it everywhere that the right is sought to be enforced,
> "but it applies only when the remedy is sought in Kan-
> "sas, and cannot follow the right beyond the bounds of
> "that state."

The Kansas statute was, of course, held inapplicable. The case of

The Harrisburg, 119 U. S., 199,

was distinguished on the ground pointed out in the discussion of that case above. The Supreme Court of Massachusetts had reached the same conclusion in the case of

Broadway Nat'l. Bank vs. Baker, 176 Mass., 294,

referred to in the quotation above. The opinion in that case says, with reference to the point in contention there:

"The statute of limitations in Kansas is of general "application. In the statute on which the plaintiff's "rights arise there is no limitation of the right founded "on a requirement that the right be enforced within a spe-"cified period of time."

That case further held that inasmuch as the defendants had not been in the State of Kansas since the cause of action accrued, the action was not barred by the statute of that state, and even if held applicable the action could be maintained in Massachusetts under the circumstances.

Of what character now is this Montana statute which opposing counsel argue must be held to bar this action begun in Connecticut. It reads as follows:

"Sec. 554. This title does not affect actions against "directors or stockholders of a corporation, to recover a "penalty or forfeiture imposed, or to enforce a liability "created by law; but such actions must be brought within "three years after the discovery by the aggrieved party "of the facts upon which the penalty of forfeiture attached "or the liability created."

It is part of a Title entitled: "The Time of Commencing Actions," which is a part of an act of the legislature of the State of Montana entitled: "An Act to Establish a Code of Civil Procedure," aproved by the Governor of said State on the 14th day of February, 1895. (See memorandum at close of act.)

The section quoted appeared for the first time in the laws of Montana in this enactment. The laws previously in force contained no section in anywise similar.

It will thus be seen that this entirely new section came into existence at a date more than two years subsequent to the time of the accrual of the cause of action here sued upon.

At the time the cause of action matured the liability section existed as Section 460 of Fifth Division of Compiled Statutes of Montana of 1887.

The section reads:

"Every such company shall, annually, within twenty "days from the first day of September, make report, which "shall be published in some newspaper published in the "town, city or village, or if there be no paper published "in said town, city or village, then in some newspaper "published nearest the place where the business of the "said company is carried on, which shall state the amount "of capital and of the proportion actually paid in and "the amount of existing debts, which report shall be "signed by the president and a majority of the trustees, "and shall be verified by oath of the president or secre- "tary of the said company, and filed in the office of the "clerk of the county where the business of said company "shall be caried on, and if any of said company shall fail "to do so, all the trustees of the company shall be jointly "and severally liable for all debts of the company then "existing, and for all that shall be contracted before such "report shall be made. No liability shall attach to any "trustee, or board of trustees, by virtue of the provisions "of this section for a failure to be caused to be published "in a newspaper the report in this section mentioned, if "within the time herein mentioned, said trustee, or board "of trustees, or company shall annually cause said report "to be filed in the office of the county clerk and recorder "of the county in which the business of the said company "is carried on, as declared in its certificate of incorpora- "tion."

The volume referred to consists merely of a compilation of laws theretofore enacted and then in force as will appear by numerous annotations throughout the volume. All of Chapter XXV., which includes Section 460 quoted, comprises an act (with certain slight amendments which appear in the annotations) passed by the first legislature of the Territory of Montana, for the organization of corporations, approved January 12, 1872, as will be seen by a notation at page 462 of the Revised Statutes of 1879. This chapter did not, at the time this cause of action matured, contain any provision in any

way affecting or limiting the time of the commencement of any action. The act indeed which embraces Section 460 had never at any time contained any such provision. The limitation statutes, all of which were general in the broadest sense of the term, had always existed as part of an entirely separate and distinct act passed February 16, 1877.

The liability section (Section 460, Fifth Division Compiled Statutes) was re-enacted in substantially the same form by an act (in which it appears as Section 451) entitled: "An Act to Establish a Civil Code," approved February 19, 1895, which act provides in Section 4653 thereof:

> "The provisions of this Code, so far as they are sub-
> "stantially the same as existing statutes, or the common
> "law, must be construed as continuations thereof, and not
> "as new enactments."

It will thus be seen that the limitation statute was never at any time a part of the act creating the liability; that it came into existence several years after the liability had accrued and fully matured, and that it was then enacted as a part of an act entirely separate and distinct from the re-enactment of the liability statute.

The entire basis of argument that the limitation prescribed by this section is available to the defendant sued in Connecticut is that it inheres in the right, or that it forms a condition upon which the right is granted. But it must be clear that if it is a condition upon which the right is granted, then it must, according to the rule in Boyd vs. Clark, supra, form a part of the act granting the right. If it had been enacted as a proviso to the act granting the right, or had even been a part of such act, limiting the time within which liabilities arising under the act could be enforced, then it would have been a "special" limitation, as that term is used in the cases cited, and the argument that it formed a part of the right would not have been without foundation.

If it had been in existence, though as a distinct act, prior to the enactment of the liability statute, as was the case in Brunswick Terminal Co. vs. Bank, supra, then counsel might have argued, using the language of the court in that case that

"it must be considered as forming a part of, as read into, the act" creating the liability.

Since, however, it was never at any time a part of the act creating the liability, and was not in existence when the liability statute was enacted, but was a subsequent enactment, appearing long after the accrual of the cause of action sued upon, the assertion that it forms a part of the right plainly appears to be unsupported either by reason or authority.

Another reason why section 55 of the Code of Civil Procedure of Montana is not available to the defendant as a defense is found in the provisions of Section 541 of the same code, which is a reenactment of Section 50 of the Compiled Statutes of 1887.

This section reads:

> "If, when the cause of action accrues against a per-
> "he is out of the State, the action may be commenced
> "within the term herein limited, after his return to the
> "State, and if, after the cause of action accrues, he de-
> "parts from the State, the time of his absence is not part
> "of the time limited for the commencement of the action."

The defendant was never in the State of Montana at any time subsequent to 1890.

Cert. p. 4, ll., 3-4.

If section 554 is an essential part of the liability sought to be enforced, so also is Section 541 an essential part of such liability. In other words, if Title II. of the Code of Civil Procedure of Montana, entitled: "Time of Commencing Actions" is to be considered applicable at all to this action begun in Connecticut, every section embraced in that Title, which has any bearing upon the inquiry is equally applicable with every other section.

If the cause of action is not barred in the State of Montana, by reason of the provisions of Section 541, then the right is not extinguished, and it may be enforced anywhere.

It is not extinguished, and cannot be extinguished in Montana by reason of the provisions of Section 541.

In

Broadway Nat'l. Bank vs. Baker, 57 N. E., 603,

an action was brought in the State of Massachusetts upon the Kansas statute above repeatedly referred to. It was held that though the Kansas statute should be considered as applying to the case, the action was not barred by reason of the fact that the Kansas statute of limitations appealed to was a provision of the general statutes of limitation of that state, by which it was further provided that the time during which a defendant was absent from the state was barred, it appearing the defendants had not been in Kansas since the cause of action accrued.

Of course, Section 541, under the uniform rulings of the courts, applies equally to persons who have once been in the state, and to those who have never been, notwithstanding the use of the word "return" in the statute.

Hanchett vs. Blair, 100 Fed., 817.

Olcott vs. Tioga, 20 N. Y., 210.

Tioga vs. Blossburg, 20 Wall., 137.

Hatch vs. Spofford, 24 Conn., 432.

In the last case cited, the Court said, with reference to a statute similar in terms, that it is applicable when the cause of action arises in another state within which both parties then resided, and so continued to reside until after the action was brought, and, after citing a large number of cases so holding, declared:

"The question at issue has been again and again de-
"cided in this country and abroad, and at this day the
"law of the case arises on judicial authority of the high-
"est and most decisive character."

It is argued, however, that absence from the state does not prevent the running of the limitation prescribed by Section 554, because that section provides: "This title does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed or to enforce a liability created by law," and Section 541 of the present code is one of the sections of the same Title, as is Section 554. But no such construction can fairly be given to Section 554.

It may be true, that giving the language a strict and literal rendition, the conclusion would follow. But observing the cardinal rule of the construction of statutes, namely, that the intention of the legislature is to control, no other conclusion can be reached than that this section merely means that the time fixed by that title will not be deemed to apply to actions of the character named in Section 554. The word "but" in introducing the remainder of the section as follows: "But such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached, or the liability created," points clearly to this construction.

In the Title embracing Section 554, being Title II., entitled: "Time of Commencing Actions," are found many provisions which it cannot be for a moment contemplated the legislature intended should not apply to actions such as are designated in Section 554. For instance, it is provided in the same title, Section 540, that "an action is commenced within the meaning of this Title when the complaint is filed." Was it intended that the legislature should establish one rule with reference to the time when all actions, save those enumerated in Section 554, should be deemed to have been commenced, and another rule with reference to such actions? Section 542 provides that the statute shall be tolled during the minority of the defendant, or his insanity, or while he is imprisoned on a criminal charge for a term less than life. Section 543 makes provision as to the time when the action may be commenced by the representative of a plaintiff, if he die before commencing the action, and the time within which an action may be brought against his representatives, if one dies leaving a cause of action against himself. Section 546 provides for the tolling of the statute during the time of war; Section 548 during the time when the action is stayed by injunction or other order of court. Section 555 provides for the interruption of the running of the statute by an acknowledgment or new promise. Section 558 provides that the objection that the action was not commenced within the time limited can be taken only by answer.

None of these provisions are applicable to actions designated in Section 554, if the construction sought to be given to it by opposing counsel is correct, and there are other provisions not enumerated above, but which will be found in the statute, that are equally inapplicable and yet it cannot be conceived that the legislature intended they should not be applicable.

But if the argument is followed to its logical conclusion, even Section 554 has no application to actions of that character, because Section 554 is a part of Title II., and if Title II. does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, then Section 554, being a part of Title II., does not affect actions of that character. The argument is thus reduced to an adsurdity and cannot obtain. A construction which makes a statute an absurdity or insensible is to be avoided.

> "Statutes should be contrued with a view to the orig-
> "inal intent and meaning of the makers, and such con-
> "struction should be put upon them as best to answer that
> "intention, which may be collected from the cause or
> "necessity of making the act, or from foreign circum-
> "stances, and, when discovered, ought to be followed, al-
> "though such construction may seem to be contrary to
> "the letter of the statute." Johnson vs. Heald, 33 Md., 352.
>
> Hooper vs. Creager, 35 L. R. A., 202.

But even though the contention of counsel as to the construction of Section 554 were to be held correct, it would not bar this action. The only possible ground upon which the Montana statute can be held to be applicable at all is that with reference to the particular liability sought to be enforced, it does not affect the remedy only, but inheres in the right, or is an incident of the right, or is incident to the right, or is a condition of the right. If it affects the remedy only, it is elementary that it cannot be considered in a foreign jur-

isdiction. Now, if it affects the right it is clear that it cannot, under any circumstances, affect this action, because the act containing Section 554 further provides (Section 3455 Code of Civil Procedure of Montana) as follows:

"No action or proceeding commenced before this "Code takes effect, and no right accrued, is affected by its "provisions."

As plaintiff's right here sued upon had accrued September 22, 1893, Section 554 passed in 1895, cannot affect such right, because the same enactment provides in another section that it shall not do so.

But Section 3455 may be omitted from consideration altogether and the result will be the same, because if it had been the manifest intention of the legislature to impose the condition upon the right to maintain the action, that suit be instituted within a certain time after the cause of action accrued, it would have been powerless, since this cause of action had then already accrued, to have done so because of the 14th Amendment of the Constitution. Legislation of that character would deprive the party in whose favor the right had accrued of his property without due process of law, in case his rights were injuriously affected.

If the limitation is of such a character as that it travels with the right and is enforcible beyond the jurisdiction of the state, a part of whose law it is, in the language of Professor Minor, quoted above, it becomes a part of the right itself, *and is governed by the same law that regulates the right in other respects.*

Satutes lengthening or shortening the periods prescribed for the commencement of actions by existing statutes of limitations are and, since the commencement of the history of constitutional law, have been held to be valid because, as it is now held, such statutes affect the remedy only and not the right.

If it is but once established that any particular statute limiting the time within which an action may be commenced is a part or an incident of the right and does not affect the

remedy merely, it must be conceded that that statute cannot be changed so as to affect existing causes of actions, for the very ground work of the rule that statutes of limitations may be changed so as to affect existing causes of action is gone.

It is a little difficult to understand how a statute passed in 1895 could be a part of or incident to, or a condition of a right which accrued in the year 1893. If it became a part of the right then the legislature changed the rights of the parties, an act confessedly beyond its power, except in respect to rights of a peculiar character, presently to be noticed.

The principle here contended for was applied in the case of

Theroux vs. N. P. Ry., 64 Fed., 84,

above referred to. The statute under consideration was the old Montana statute giving an action for wrongful death, which provided in the very act conferring the right that the action to enforce it should be commenced within three years. The Minnesota statute to recover for wrongful death in Minnesota likewise contained in the very act itself a provision that the action to enforce the liability should be commenced within two years. It was contended that the action was barred by the Minnesota statute. The Circuit Court of Appeals for the Eighth Circuit, said:

> "To refuse to entertain such a suit within three years "would be to subtract from the liability, and to impair "the right intended to be conferred by the laws of Mon- "tana; for the period allowed within which to enforce "the liability, as we have before shown, is a substantial "part of the liability imposed and of the right intended to "be created."

In the opinion it had theretofore been said:

> "It must be accepted, therefore, as the established "doctrine, that where a statute confers a new right, which "by the terms of the act is enforcible by suit only within "a given period, the period allowed for its enforcement "is a constituent part of the liability intended to be "created. The period prescribed for bringing suit in such "cases is not like an ordinary statute of limitations, "which merely affects the remedy. It follows, of course, "that, if the Courts of another state refuse to permit the

"cause of action to be sued upon during a part of th
"period limited by the foreign law, to that extent the
"refuse to give effect to the foreign law, and by so doin
"impair the right intended to be created."

If the Montana statutes of limitations constituted a part of the right, then at any time prior to the first of July, 1895, the plaintiff and his assignors, had the right to recover of the defendant the sums mentioned in the complaint at any time until the defendant should have come and remained within the state of Montana one year.

By the act of 1895, this right was taken away, and they were given, instead, a right to recover at any time within three years after they discovered the facts upon which the liability came into existence, assuming the construction of Section 554 contended for by our opponent to be correct.

As a matter of course, if the legislature of Montana can change the rights of the parties, either increase or dimish them, they can take those rights away and destroy them altogether. But the law does not permit this.

"Rights accrued and vested under a statute cannot
"be divested by a repeal or modification thereof."
Benson vs. Mayer, 10 Barb., 223-244.

In

Kavanaugh vs. Board of Police Commissioners, 66 Pac., 36,

the plaintiff brought an action to recover the sum of one thousand dollars claimed to be due as the widow of a fireman, under a statute which awarded to persons occupying her postion a pension in the amount sued for in case her deceased husband had served as a fireman for more than twenty years. Before she obtained judgment the statute was repealed, but it was held that it could not affect her right of action which had accrued before the repeal. To the same effect is

Kay vs. Railroad Co., 65 Pa. St., 269.
See Wade, on Retro-Active Laws, 143-172-194.

It is true that where a statute gives a right of action for a penalty in the strict sense of the term (no cause of action

existing against any one in favor of the plaintiff, except by virtue of the statute giving the penalty), no recovery can be had if the statute is repealed before judgment.

This involves a consideration of the subject of penalties. The matter received some consideration from this Court in

Huntington vs. Attrill, 146 U. S., 657.

That was a suit in equity brought in the Circuit Court of Baltimore by the plaintiff to subject certain property to the satisfaction of a judgment recovered in a Court of the State of New York. The bill alleged not only such judgment, but the original liability arising under the provisions of Sec. 21 Statute of New York of 1875, C. 611. The original cause of action, therefore, upon which that judgment was recovered was identical with that which is the foundation of the present action, with the exception that the liability in that case arose under the provision making the directors of the corporation liable for the debts of the company, in case the report required to be filed was false in any material respect, while in the present action, the liability arises under the provision which makes the directors so liable in the event of a failure to file the report. It is plain that the two actions cannot be distinguished upon that ground.

In that case the defendant made the objection that the suit could not be maintained in Maryland, inasmuch as the liability, which was the foundation of the judgment recovered in New York, was in the nature of a penalty arising under a statute of the State of New York, and which penalty could not be enforced beyond the territorial limits of the State of New York. This objection was overruled in the trial Court, but its decision was reversed by the Appellate Court and the suit was brought into this Court on writ of error to review such decision. This Court there determined that the nature of the original liability was not changed by recovering judgment upon it.

The language of the Court upon the question was:

"The essential nature and foundation of a cause of ac-
"tion, indeed, are not changed by recovering judgment
"upon it."

The Court then proceeded to consider the character of the original cause of action and holding that it was not for the recovery of a penalty in the strict and international sense, reversed the judgment of the Court of Appeals of the State of Maryland.

The question as to whether the legislature of the state had the right to repeal such statutes so as to affect existing causes of action was left undetermined by the Court, but it referred to the case of

Hawthorne vs. Calef, 2 Wall., 10-23,

as possibly holding that it had not.

A case perhaps more nearly in point is

Steamship vs. Joliffe, 2 Wall., 450.

A statute of California imposed upon a vessel declining the services of a pilot half fees. The act was subsequently repealed, but a pilot who had become entitled to fees under it was permitted to recover. The Court says:

> "The transaction between the pilot and the master "or owners cannot be strictly termed a contract, but it is "a transaction to which the law attaches similar conse- "quences; it is a quasi contract. Resting upon transac- "tions regarded by the law as a quasi contract, there is "no just ground for the position that it fell with the re- "peal of the statute under which the transaction was had. "When a right has arisen upon a contract or a transac- "tion in the nature of a contract authorized by statute "and has been so far perfected that nothing remains to "be done by the party asserting it, the repeal of the stat- "ute does not affect it, or an action for its enforcement. "It has become a vested right which stands independent "of the statute."

It may be observed that this decision was rendered before the adoption of the 14th Amendment and rests upon the contract clause of the Constitution. It would have been plainly justifiable under the Amendment had it been in existence. Its scope is manifestly broader than that of the contract clause of the Constitution.

It unquestionably protects causes of action accrued to a widow for the negligent death of her husband given by a

statute after repeal, though such right partakes of none of the elements of a contract.

Tiffany on Death by Wrongful Act, 31.

Osborne vs. City, 32 Fed., 36.

We venture to say that every right of action, not penal in the strict sense—that is, in the sense of a prosecution for the punishment of a crime, a public wrong, is saved by the amendment against adverse legislation by a state.

The question under consideration was before the Court in

Tinker vs. Van Dyke, 1 Flip., 521;

Fed. Case, 14058.

The old bankrupt act avoided a preference given to a creditor having reasonable cause to believe the bankrupt insolvent. This was amended in 1874, so as to leave the conveyance valid, unless the creditor knew the bankrupt to be insolvent. It was held that the old statute remained applicable to causes of action arising after its passage and prior to the amendment. The argument was made that the liability created by the original act was in the nature of a penalty which could be taken away or changed at the will of Congress, and as a foundation for the argument reference was made to cases such as Halsey vs. McLean, 12 Allen, 438, holding that laws which imposed liabilities upon the officers and shareholders of corporations for the non-performance of some duty, being penal in their character, will not be enforced in foreign jurisdictions. It was argued, and with sound reason, that if the law is penal in the sense that it cannot be enforced in a foreign jurisdiction, it is penal in the sense that it is subject to repeal. The Court said:

> "A law which created a liability between citizen and "citizen, as further security for the contracts of a cor- "poration of which the obligated person is a member, has "in it no penal element whatever in that sense which "makes one Court refuse to enforce the penalties of for- "eign governments."

> "All those provisions of law intended to secure the "performance of private contracts, and in which the prop-

"erty rights of private citizens alone were concerned, "should never have been deemed penal statutes within "the rule excluding jurisdiction."

"A very large percentage of all the commerce, man- "ufacture and trading of the country is coming to be done "by state corporations; the citizen relies in large degree "upon the security afforded by those obligations imposed "upon officers and shareholders for an omission of their "duty. To call this obligation a penalty is to exclude the "jurisdiction of the Federal Court by a mere name. We "can see no distinction in principle between a state stat- "ute which should repeal a provision in a railroad or bank "charter, rendering liable directors and shareholders if "they incurred debts beyond the amount of the capital "paid in, or failed to make proper scrutiny and publicity "of the accounts of their corporation, and a law divest- "ing such a liability, unanimously held to be unconstitu- "tional in Hawthorne vs. Calef, supra."

And then, touching the right of the legislature to amend or repeal acts of the character of the law creating the liability in this case, the Court added:

"The rule so frequently quoted in the books that "what is created by statute may be taken away by stat- "ute was largely relied upon at the bar. We remarked "during the argument, and now repeat, there never was "any such rule administered anywhere.

"When remedies are created, penalties enacted, "crimes defined and punished, political regulations, es- "tablished by statute, they may be abrogated by their "repeal.

"When repealed, the presumption is in favor of a "retro-active application. It is a misdescription of the prin- "ciple involved in these classes of cases to say the right "of action is gone because they are statutory.

"They are gone on account of the nature of the stat- "ute, the right regulated, and the persons to be affected; "because, in these peculiar instances, and other analogous "cases, statutory rights are abrogated by repeal of the law "it by no means follows that all other statutory rights of "a different character, creating substantial property "rights, upon which business transactions between citi- "zen and citizen are vested, fall under the same circum- "stances."

If the privilege which the plaintiff, or his assignors, enjoyed at the time the right of action accrued, to bring and maintain their action against the defendants at any time within one year from the time the defendants came into the State of Montana, was a part of the right granted them by the statute, and inhered in the right, or was an incident of the right, and was not a mere regulation concerning the remedy which would be afforded in the Courts of Montana for the enforcement of the right, such right, so granted, with all its incidents, was not only protected from adverse legislation by the 14th Amendment to the Constitution of the United States, but by the express and direct provisions of the Constitution of the State of Montana, providing that the legislative assembly should pass no law for the benefit of a railroad or other corporation, or an individual, or association of individuals, retrospective in its operation.

Const. of Montana, Art. XV., Sec. 13.

The two rules of law are cognate, that the legislature may repeal laws imposing "penalties," and there being no saving clause that all rights of action for past infractions is gone, and that "penalties" are enforced only by the Courts of the state imposing them. The two principles are founded on the same basis and refer to the same kind of "penalties." For illustration of the kind of penalties which cannot be enforced on repeal of the law imposing them, see

Myer on Vested Rights, 35.

It is clear that, applying settled principles of the law, concerning which there is practical unanimity in the decisions, to the facts presented by this certificate, it must be held that Section 554 of the Montana statutes of limitations is inapplicable, that it does not bar this action if it is applicable, and that the question certified should accordingly be answered in the negative.

Respectfully submitted,

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